DINERO OIL CORP.

IBLA 84-572 Decided January 28, 1985

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting acquired lands oil and gas lease offers NM-A 41444 TX through NM-A 41454 TX inclusive.

Set aside and remanded.

1. Bureau of Reclamation: Generally -- Mineral Leasing Act for Acquired Lands: Lands Subject to -- Oil and Gas Leases: Acquired Lands Leases -- Oil and Gas Leases: Consent of Agency -- Oil and Gas Leases: Discretion to Lease -- Oil and Gas Leases: Lands Subject to

   While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

APPEARANCES: Bruce Anderson, Chief Executive Officer and Chairman of the Board, Dinero Oil Corp., Houston, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Dinero Oil Corporation (Dinero) appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated March 28, 1984, rejecting acquired lands oil and gas lease offers NM-A 41444 TX through NM-A 41454 TX inclusive. These offers were filed in June 1980 for lands included in the Choke Canyon Dam area of the Nueces River Project under the jurisdiction of the Bureau of Reclamation (BuRec). BLM rejected the offers because it determined that leasing would not be in the public interest.

Prior to issuing its decision, BLM sought title reports from BuRec. By memorandum of May 25, 1982, BuRec stated that the Nueces River Project was still in "a construction status." It reported also that its mineral acquisition program was ongoing, and until such program was completed it preferred to refrain from leasing lands in the project. The estimated completion date

for mineral acquisition was set forth as October 1, 1983. Appellant was informed of BuRec's recommendations by letter of June 8, 1982, wherein BLM stated that appellant's offers would be held in abeyance until October 1, 1983.

On December 9, 1983, BuRec updated its title report stating that it continued to acquire minerals at the project and upon completion of this task, it would develop an oil and gas management plan in consultation with local project managing entities for the entire project. It further reported that only after completion of this management plan would it consent to any oil and gas leasing at the project. Its estimated completion date for the oil and gas management plan was set at October 1, 1985.

BLM's decision of March 28, 1984, reiterated these facts in stating that BuRec had denied its consent to lease in the project area. BLM also stated that it had given BuRec's recommendations careful consideration and, after having made its own independent evaluation of the circumstances, had determined that leasing at that time would not be in the public interest. Until proper planning documentation was completed, the impacts of leasing could not be fully assessed, BLM concluded.

In contrast to its earlier action BLM then rejected appellant's offers, rather than hold them pending future availability of the land or interests. Rachalk Production, Inc., 71 IBLA 374 (1983), and J. G. Hatheway, 68 I.D. 48 (1961), were cited by BLM as authority for this latter point.

In its statement of reasons on appeal, Dinero quotes Robert G. Lynn, 76 IBLA 383 (1983), for the proposition that where an offer to lease lands not withdrawn from leasing has been refused, the record of BLM's action should establish that BLM first considered whether the public interest could be protected by the use of reasonable stipulations to the lease. As a result of the Lynn case, appellant contends, instruction Memorandum (IM) 84-254 was issued. That document states in part:

> If a decision is to be made to reject a lease offer, the record * * * must clearly support that leasing, even with a NSO [no surface occupancy] stipulation, is not in the public interest. The justification must be substantive and site specific. Ordinarily, adequate justification should not be possible since a NSO stipulation effectively prevents damage to any resources or land values.

Appellant charges that BLM erred by failing to consider the use of stipulations before rejecting the offers at issue.

Addressing BuRec's minerals acquisition program, Dinero states that BuRec has completed this program on the Choke Canyon Dam Project. Twenty percent of all minerals in the project remain outstanding, Dinero concedes, but none of these minerals are included in its offers. In appellant's view, these outstanding minerals are not necessary for the completion or operation of the project, and are unlikely to be acquired by BuRec. Four years have

elapsed since its offers were filed, and this fact, appellant states, should entitle it to at least maintain its first priority for these parcels.

Robert G. Lynn, supra, was an appeal from BLM's rejection of an offer to lease lands for oil and gas in the Algodone Dunes Outstanding Natural Area. That case and the Board's cases cited therein require BLM to consider the use of stipulations before rejecting on the merits an offer to lease lands in an environmentally sensitive area. 1/

[1] BuRec's correspondence with BLM indicates that BuRec is presently conducting a minerals acquisition program for lands in the general area of those sought by Dinero. Following this program, it will develop an oil and gas management plan. To require BuRec (or BLM) to consider leasing the subject lands with protective stipulations at this time is to assume that a decision has been made with respect to the minerals therein. Contrary to the facts in Lynn, no such decision has, in fact, been made. Although we note that appellant's offers have been outstanding for some time now, the difficulty of acquiring the outstanding minerals is acknowledged by appellant itself.

An internal BLM memorandum, dated March 20, 1984, explains BLM's position in greater detail:

> After meeting with Bureau of Reclamation and evaluating the situation relating to [the Nueces River Project] it is our determination that leasing at this time is not in the public interest. The acquisition program for the project is not yet complete, nor have management plans and environmental analyses been developed.
>
> It is extremely important that land use decisions, (e.g., oil and gas leasing), be based on adequate planning and environmental documents. Failure to do proper planning results in poor decisions and inadequate environmental protection. The Bureau of Reclamation projects that planning and environmental works will be completed sometime in October of 1985. These documents will determine which areas may be leased and the proper stipulations to be applied to each lease.
>
> This logical planning process will greatly enhance the adjudication of future applications. The increased efficiency will save considerable time and money, and result in fewer administrative and environmental problems. The alternative of a "piece-meal" approach is poor land management practice. The BLM, therefore, has determined that rejection of these applications at this point in time is in the best public interest. [Emphasis supplied.]

1/ For example, Ida Lee Anderson, 70 IBLA 259 (1983), and Mary A. Pettigrew, 64 IBLA 336 (1982), cited in Lynn, involved offers to lease for oil and gas in a primitive area and critical raptor habitat, respectively. Robert P. Kunkel, 41 IBLA 77 (1979), involved an offer to lease in a recreation area with scenic values.

The underscored language above suggests that BLM will consider the use of stipulations before rejecting an offer to lease on the merits. 2/

While the record contains adequate support for not issuing leases at this time, we turn to appellant's argument that its offers should be allowed to maintain their priority. The general Departmental policy is to reject applications or offers for lands which are not available for the requested disposition at the time they are filed or considered. J. G. Hatheway, supra. Therein, the Department stated:

> This rule has been followed whether the lands applied for were unavailable because of a statute, 4 a withdrawal, 5 a temporary disposition, 6 or the exercise of the Secretary's discretion. 7
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> 4 Noel Teuscher at al., 62 I.D. 210, 214 (1955).
> 5 Mary E. Brown, 62 I.D. 107 (1955).
> 6 R. B. Whitaker et al., 63 I.D. 124 (1956).
> 7 Grace F. Holbeck, A-27357 (August 20, 1956).

Id. at 51.

Subsequently, the Department promulgated a regulation which provided for the acceptance of all applications for filing and stated that applications could not be held pending possible future availability of the land or interests in land, when approval is prevented in five express situations. 43 CFR 2013.1(c), 29 FR 4301, 4339 (Mar. 31, 1964). 3/ The same regulation, with only a minor exception to the language of the first situation, not relevant herein, presently is found at 43 CFR 2091.1.

2/ While this case was before the Board, BLM issued IM 84-452, Change 2, on Nov. 13, 1984. That memorandum states that the public interest should rarely be considered harmed by issuance of an NSO lease as an alternative to no leasing "except in such cases as where subsurface entry is a concern, as in proximity to a dam structure."

3/ That regulation stated:

"(c) Except where regulations provide otherwise, all applications must be accepted for filing. However, applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:

"(1) Withdrawal or reservation of the lands;

"(2) An allowed entry or selection of record;

"(3) An irrevocable lease which grants the lessee exclusive use of the land;

"(4) Classification under appropriate law;

"(5) The fact that for any reason the land has not been made subject, or restored, to the operation of the public land laws."

The exercise of Secretarial discretion was not one of the listed circumstances.

The practice of not suspending offers or applications is founded on sound administrative practice in that it prevents the public land records from being burdened with numerous applications or offers on which there is no possibility that action can be taken in the foreseeable future. Paul C. Kohlman, 75 IBLA 171 (1983); J. G. Hatheway, supra. The Board has cited and followed this practice in many cases. E.g., Rachalk Production, Inc., 71 IBLA 374 (1983); Esdras K. Hartley, 23 IBLA 102 (1975). The policy is, however, not without exception. Thus, where the circumstances of a case warrant suspension and suspension is not prohibited by 43 CFR 2091.1, offers have been suspended pending contingencies which would determine whether lands should be leased. Justheim Petroleum Co., 18 IBLA 423, 424 (1975). In that case the Board suspended oil and gas lease offers which were in conflict with state selection applications "until such time as the state selection applications are judicially resolved, including the exhaustion of all appeal rights." Id. at 424. Also, oil and gas lease offers filed in Alaska prior to Public Land Order No. 4582 of January 17, 1969, were suspended in accordance with the terms of that and subsequent orders. In another case, Energy Partners, 21 IBLA 352, 357 (1975), the Board suspended geothermal lease applications, not otherwise defective, pending a final judicial resolution of a title question as to certain lands. In addition, in a case involving a simultaneous oil and gas lease offer the Board set aside a BLM decision which had rejected the offer because it covered lands within a critical watershed which was to be the subject of an environmental impact statement (EIS). The Board found that the offer should be suspended until completion of the EIS and then a determination made of whether to lease, and if so, under what conditions. Adrian Overton, 29 IBLA 66, 67 (1977).

Herein, appellant filed its offers in 1980. In June 1982 BLM informed appellant that it would hold appellant's offers in abeyance until October 1983, the estimated completion date for BuRec's minerals acquisition program. In its December 1983 title report update BuRec explained that it would not consent to leasing until completion of its oil and gas management plan. It estimated the completion date to be October 1, 1985. In March 1984 BLM rejected the offers stating that they could not be suspended.

In this case the justification for precluding leasing at this time is BuRec's desire to complete its minerals acquisition program and develop an oil and gas management plan. That is not a reason which would prohibit suspension within the ambit of 43 CFR 2091.1. Under the circumstances of this case, we find that suspension is warranted. Appellant's offers have been pending for 4 years. If its offers are rejected, other offers will likely be filed and it will be a matter of pure happenstance as to the offers which have priority at the time BuRec completes its oil and gas management plan. Appellant's offers should be allowed to maintain their priority until such time as BuRec develops its oil and gas management plan, or otherwise indicates its readiness to consider oil and gas leasing in the project area. At that time a determination on whether to issue leases on the basis of appellant's offers can be made. 4/

4/ We note that in its statement of reasons appellant indicates a willingness to accept no surface occupancy stipulations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is set aside and the cases remanded with instructions to suspend appellant's lease offers until such time as BuRec develops its oil and gas management plan or otherwise indicates its willingness to consider oil and gas leasing in the project area.

Bruce R. Harris
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

Acknowledging that the Department generally rejects mineral lease offers which are not susceptible to immediate adjudication, the majority opinion finds an exception to the general rule in this case so as to permit retention of appellant's offers without action. To justify holding appellant's lease offers for an indefinite period while BuRec completes acquisition and evaluation of the minerals here sought to be leased, the majority rely upon three prior Board decisions; in two of those prior cases, both decided in 1975, lease offers were ordered to be held in suspense for an indefinite period, being neither rejected nor accepted, until title to the resource sought to be leased was determined. Those cases, however, were factually dissimilar from this appeal.

In Justheim Petroleum Co., 18 IBLA 423 (1975), decided February 13, 1975, offers to lease for oil and gas had been made for tracts which were the subject of a pending court action. As pointed out by the Justheim dissent, 18 IBLA at 426, the Department was a party to the suit in court, and had taken a position which, if vindicated, would have resulted in title to the resource being confirmed in the United States. Id. at 426. In Justheim, therefore, the Department was in the anomalous position of rejecting a lease offer for lack of jurisdiction over it while arguing in pending litigation that it in fact possessed jurisdiction over the resource sought to be leased. Faced with this circumstance the majority opinion ordered the offers "suspended until such time as the state selection applications are judicially resolved, including the examination of all appeal rights." Id. at 424.

In Energy Partners, 21 IBLA 352 (1975), decided 6 months following Justheim, a divided Board again made an exception to the general rule requiring rejection of offers which cannot be adjudicated. Again, in Energy Partners, the resource sought to be leased was involved in litigation in the Federal courts. In that case, applications for geothermal leasing were confronted by pending litigation which had been brought to resolve the question whether the geothermal resources sought to be leased were reserved minerals, and, therefore, available for lease. See 21 IBLA at 355, 356. Citing Justheim, the majority found that it was permissible to continue to hold the geothermal applications in suspense "until there is a final authoritative judicial resolution of the geothermal resources title question in those patented lands." Id. at 358. Again the Department was actively engaged in litigating the question of title to the resource.

In the third case, Adrian Overton, 29 IBLA 66 (1975), BLM had rejected a simultaneous oil and gas lease offer for the reason that the tract sought had been improperly included in the lease drawing. There, BLM determined that the land was under active environmental review and would, at least, probably be subject to drilling restrictions. This Board, however, reversed, finding an insufficient basis was stated upon which to withdraw the tract from the drawing. 29 IBLA at 67. Since this ruling, however, left for determination the exact status of the tract pending completion of the pending environmental analysis by BLM, the Board remanded the matter to BLM for final action consistent with the completed environmental impact statement. Since the applicant

in Overton was, like appellant here, willing to accept any drilling limitation which might be imposed, so long as the lease issued to him in some form, the effect of the Board's decision was to authorize lease issuance, subject to possible extinguishment by requirements of the completed environmental review.

The decision in Overton, therefore, unlike those of Justheim and Energy Partners, involved a decision on the merits of the lease application itself. In Overton, the decision made by the Board required acceptance of the offer; because of the nature of the offer in that case, an additional element was added by the fact the lease application was made for a simultaneous drawing and had been first drawn. As Overton observes, "[W]hen, in its simultaneous filing procedures, BLM has solicited oil and gas lease offers for a parcel of land not otherwise withdrawn for leasing, and thereafter called upon the successful drawee for submission of rental payment, subsequent rejection of offers should not be lightly made." 29 IBLA at 67.

In this case now on appeal, however, appellant is not a successful drawee in a simultaneous drawing nor is the land sought to be leased the subject of litigation. Because of the reliance placed upon these three prior Board decisions by the majority opinion to avoid the application of a Departmental rule respecting applications generally, the distinction between the three cases relied upon and the factual situation involved in the Dinero offer is crucial.

The facts concerning this lease offer, so far as are revealed by the record on appeal, are set out by the majority opinion. The present status of the BuRec mineral acquisition program is not exactly known. BuRec first estimated that mineral interests located within the project would be acquired no later than October 1, 1983. That date is now advanced to October 1, 1985. However, appellant argues persuasively that the probable time for completion of acquisition cannot be predicted; Dinero observes: "Briefly put, the BR is never going to acquire all of the minerals under this project unless they are condemned; they are not going to be condemned because they are not essential, and as long as they are not acquired BR can prolong the noncompetitive mineral leasing process" (Statement of Reasons at 2, 3). 1/

1/ If Dinero is correct that the mineral interest in the BuRec project lands is not necessary to the project itself for some purpose, such as protection of the dam or reservoir, then presumably the acquisition of this interest by the United States is made for the strategic reserve, to enable the mineral deposits to be developed. In this situation, the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982), provides that "Except where lands have been acquired by the United States for the development of the mineral deposits * * * all deposits * * * acquired by the United States * * * may be leased * * *." (Emphasis supplied.) The legislative history of the Act indicates this exception is intended to be limited to "minerals essential to the defense" not enumerated by the statute. See H. Rep. No. 550, June 9, 1947, 80th Cong. 1st Sess, reprinted in 1947 U.S. Code Cong. Service 1661, 1663. Despite this limitation, however, it seems unlikely both factually and legally that acquisition of the mineral interests located within the river is being

Regardless whether the BuRec or the Dinero estimate is most realistic, it is apparent the nature and extent of the mineral interest acquired by BuRec in the Nueces River Project is a matter which will be resolved in the future, and that Dinero's offer is really an offer to acquire a future interest of the type contemplated by Departmental regulation at 43 CFR 3111.3-1; i.e., it is a noncompetitive lease offer for a future interest in lands not known to contain mineral deposits. Such a lease may, pursuant to 43 CFR 3111.3-1(b), be issued only to one who already holds all or most of the operating rights in the lands sought to be leased. The record does not reveal whether Dinero would be qualified or not to acquire a future interest in the lands offered to be leased under the "future interest" regulation.

Even if the offers made by appellant were to be treated as an offer to lease whatever interest BuRec holds, BLM's decision to reject appellant's offers was correct. In a typical application of the Department's rules regarding offers to lease uncertain interests, reported in Grace F. Holbeck, A-27357 (Aug. 20, 1956), the Department was asked to lease whatever interest it had available for lease on an island in the Yellowstone River in Montana. The record was unclear as to whether part or all the island may have been located within an Indian reservation, which would have made this island, or part of it, unavailable for lease. In deciding to reject the application it was determined that rejection of the application was proper because of the absence of certitude concerning the availability of the island for oil and gas leasing. The opinion holds:

> [T]he question of whether this island was or was not within the reservation depends upon whether the main channel of the river ran on its north or south side. There is little in the record which would support a determination either way.
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> The appellant has offered no evidence at all to support a finding that any of the island is available for leasing under the Mineral Leasing Act. In the absence of any proof that the Director was in error, there is no reason to change his decision.

Id. at 3.

The same test used in Holbeck should be applied here; appellant should be required to show he is entitled to an exception to the general rules that applications for lands not currently available for leasing will be rejected. See J. G. Hatheway, 68 I.D. 48 (1961). It has not been shown that appellant's offer falls into either of the two previously announced exceptions; there is no pending litigation which frustrates a lease that would otherwise be issued, nor has there been a simultaneous lease drawing at which Dinero was first selected.

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fn. 1 (continued)
made for purposes unrelated to the project itself, as Dinero seems to argue. Quite clearly, however, it is possible that leasing within the project is not a certain event, and will, in any event, be made only upon a proper exercise of Secretarial discretion. See Udall v. Tallman, 380 U.S. 1 (1964).

This raises an additional problem inherent in the majority approach. Central to the finding made by the majority is a determination that there is, in this case, an option open to BLM which permits the agency to hold appellant's lease offers without action. This finding, which appears in footnote 3 to the majority opinion, is based upon the premise that there are some situations involving the exercise of Secretarial discretion in which a refusal to take action upon an offer is not prohibited by the regulation establishing what action is to be taken upon applications made to the Department. This regulation, however, at 43 CFR 2091.1, does not by implication provide a no-action alternative to be taken for certain types of offer. The regulation provides, in fact, that applications for future interests in land must be rejected when approval of the application is prevented by "[t]he fact that for any reason the land has not been made subject * * * to the operation of the land laws." See 43 CFR 2091.1(e). In this case the applications made by appellant cannot be approved because the interest sought by appellant has not yet been fully acquired, and, consequently, because a reasoned determination concerning availability for lease based upon a rational analysis of the character of the interests acquired has not yet been made.

Moreover, even were there a hiatus in the regulation so as to permit some applications to be held without action, prior Departmental practice has been to forbid such handling of lease offers, as pointed out by the Hatheway decision. Hatheway, supra at 51, took the position that the exercise of the Secretary's discretion was not an exceptional circumstance which would permit an offer for unavailable land to be held without action. The exercise of Secretarial discretion is, according to Hatheway, one of the cases where the rule will be applied. The only previous exception to the rule, therefore, has been in cases where lawsuits have frustrated approvals of applications which would otherwise have been acceptable. See Justheim, supra; Energy Partners, supra. Dinero has failed to establish any reason uniquely peculiar to the facts of its lease offers, why those offers should be held without action until a future time when they can be acted upon. Dinero has therefore also failed to establish that it is entitled to continue to hold its place in line as senior offeror.

The majority conclusion that rejection of appellant's offers may result in a later award to another offeror is not a reason why these leases should be given exceptional consideration. On the contrary, the record reveals that there is no reason for not rejecting the offers in this case. Prior Departmental practice establishes that BLM's determination to reject, in the decision on appeal, because leasing cannot presently be accomplished in the proper exercise of the agency's discretion, is apparently correct. In the absence of a showing that the circumstances of this case permit a suspension of agency action, the offers by Dinero should be rejected. 43 CFR 2091.1; Rachalk Production, Inc., 71 IBLA 374 (1983). While this may cause appellant to lose its priority if the land becomes available for leasing, that is simply the effect of the uniform rule which requires rejection of all premature offers.

Franklin D. Arness
Administrative Judge.